

March 31, 2008

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VIA FEDERAL EXPRESS

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
601 D Street NW
Room 421
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-11-2-08568

Re: Consent Decree for Remedial Action and Remedial Design
Ogden Rail Yard Site, Ogden, Utah
EPA Site/Spill ID No. 08-7E, OU 1 and OU 4
Consent Decree Case No. 1:06CV00115-BSJ
DOJ Case No. 90-11-2-08568
Partial Contesting of Future Response Cost Invoice and
Notice of Dispute

Dear Chief, Environmental Enforcement Section:

This letter is sent on behalf of Union Pacific Railroad Company ("Union Pacific") under Section XVI., ¶ 57, *et seq.*, of the above referenced Consent Decree for Remedial Action and Remedial Design ("Consent Decree"), effective December 21, 2006. Union Pacific is hereby contesting \$70,000 in direct costs billed by Pacific Western Technologies, Ltd. ("PWT") under EPA Contract No. EPW06006, and the associated amount of \$22,953 in indirect costs (at a rate of 32.79%), for a total amount of \$92,953 billed to Union Pacific by letter dated January 14, 2007 and transmitted by Martha A. Walker, EPA Financial Management Officer, to Dennis C. Farley ("Response Cost Invoice"), a copy of which is attached. The Response Cost Invoice covers the period from October 1, 2006 through September 30, 2007. Union Pacific contests the above-described PWT portion of the Response Cost Invoice as costs incurred that are inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") as documented herein. Pursuant to the Consent Decree, § XIX, ¶ 67, this letter also constitutes Union Pacific's Notice of Dispute to the United States.

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I. Background and Relevant Chronology

The Ogden Rail Yard Site ("Site") is not a Superfund Site, but has been treated as a Superfund Alternative Site. Consent Decree, § I., ¶ F. Union Pacific, as the current owner of the Site, conducted a thorough evaluation of Site environmental conditions preceding the Consent Decree. Indeed, Site investigation was well underway prior to either the State of Utah or EPA issuing any order.

Union Pacific, the Settling Defendant under the Consent Decree, did not admit any liability thereunder in connection with the Site. Consent Decree, § I., ¶ E. Specifically, the Site was historically a base of operations for at least five railroad companies, including the Denver & Rio Grande Western Railroad, the Central Pacific Railroad, the Southern Pacific Railroad, Union Pacific Railroad Company, and the Utah Central Railway. Further, it has been well documented that the Utah Department of Transportation ("UDOT") contributed to the dense nonaqueous phase liquid ("DNAPL") presence in 21st Street Pond portion of the Site. Nonetheless, Union Pacific has been engaged since before 2000 to characterize any contamination identified at the Site and to remediate the same. See, Consent Decree, § I., ¶ G.

Two Records of Decision ("RODs"), one for OU 1 (21st Street Pond) and one for OU 4 (industrial sewer line), were issued by EPA on September 30, 2004. Consent Decree, § I., ¶ J. In very general terms, the Consent Decree required that Union Pacific investigate an industrial sewer line on the Site, remediate areas contaminated by the industrial sewer line, and conduct DNAPL remediation at the 21st Street Pond. As the OU 4 work was implemented, the sewer line investigation was completed in November 2006 and, after the soil sampling plan was developed and approved by EPA, the sewer line soil excavation site work was completed in August and September 2007. See attached table setting for the billing period, CH2M Hill invoice, and description of the work conducted ("CH2M Hill Work").

EPA did not allow the State of Utah ("State") to participate in Consent Decree negotiations, so Union Pacific negotiated a separate agreement with the State. Pursuant to that agreement, the State also provided oversight of Union Pacific's activities, the costs of which Union Pacific has also paid. EPA's oversight contractor, PWT, was essentially at the Site full time from late 2006 through the end of 2007, though oversight activities were neither necessary nor conducted during some of this period (as noted in more detail below). Union Pacific contracted with CH2MHill as its contractor to perform the work under the Consent Decree. CH2MHill has been an oversight contractor for EPA in Region VIII and currently is an oversight contractor for EPA in Region X. CH2MHill is known to be highly skilled and thorough as an environmental remediation contractor.

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Despite these multiple layers of oversight, because the Site is in Utah and EPA's offices are in Denver, Colorado, on occasion, the EPA remedial project manager traveled from Denver to Ogden to provide additional oversight. In short, at a non-Superfund Site, where Union Pacific already had performed substantial work, Union Pacific has been subject to oversight from EPA, an EPA contractor, the State, even though CH2MHill, a trusted contractor, was performing the work, and no work product under the Consent Decree was ever rejected.

The Response Cost Invoice was dated January 14, 2008 and received by Mr. Gary Honeyman, Union Pacific's Environmental Site Remediation manager, on January 23, 2008. However, though Mr. Honeyman requested a meeting on January 30, 2008 to review the Response Cost Invoice with EPA, the meeting was not scheduled until February 14, 2008. The Consent Decree requires payment of all Future Response Costs within thirty (30) days of Union Pacific's receipt of the bill for same, unless the bill is contested. Consent Decree, § XVI., ¶¶ 56-57. In this case, the payment date could have been as early as February 14 or 15 (upon receipt by Mr. Farley), though Union Pacific would not have the benefit of any additional information or clarification provided at the February 14, 2008 meeting with EPA. In an abundance of caution, Union Pacific paid the entire invoice, by wire transfer, to avoid a violation of the payment deadline established by the Consent Decree. See attached Agency Fedwire Message Detail Report.

Mr. Honeyman had made clear that the purpose of the meeting was to review the Response Cost Invoice but did not request an extension for payment at the time of setting the meeting. Accordingly, Union Pacific's payment was under reservation of the issues to be discussed at the February 14 meeting. Indeed, at that meeting EPA agreed to extend the time of payment and the time to file any contest of payment until March 31, 2008. See attached electronic mail message from Ms. Carol Pokorny dated February 14, 2008. Moreover, upon receipt from Ms. Pokorny of another message dated February 19, 2008 stating payment was received, the undersigned telephoned EPA Enforcement Attorney, Andrea Madigan, to advise that Union Pacific nonetheless intended to contest a portion of the PWT fees and request that the portion of the response costs successfully contested be applied to a subsequent invoice.

II. PWT's Oversight Costs Are Unreasonable and Inconsistent with the NCP.

The United States can only recover costs that are incurred in a manner not inconsistent with the NCP.¹ EPA's failure to comply with the NCP is a complete defense to the recovery of inconsistent costs.² To establish inconsistency on the part of EPA, Union Pacific must show that

¹ 42 U.S.C. § 9607(a)(4)(A).

² *In re Bell Petroleum Servs. Inc. (EPA v Sequa Corp.)*, 3 F.3d 889, 906-08 (5th Cir. 1993).

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EPA acted arbitrarily and capriciously.³ Courts have found this standard to be met where EPA implemented an unnecessarily expensive remedy.⁴ In short, remedial action measures, including response costs, must be cost-effective.⁵ Costs incurred inconsistent with a remediation plan can be challenged and should not be allowed.⁶ Similarly, where, as here, response costs are unreasonable, they should not be allowed.⁷

A portion of EPA's expenditures for its contractor, PWT, fall into this category – unnecessarily expensive and unreasonable. Indeed the costs were inappropriate. Specifically, PWT charged EPA oversight costs for “keeping the contract open” while they waited for the OU 4 sewer line soils remediation work to be completed. PWT was paid \$10,000 per month for seven months to do almost nothing. These costs (7 months at \$10,000) are the costs that Union Pacific challenges. The unreasonableness of the costs can be demonstrated in several different ways: (1) by the overall level of oversight; (2) by comparison to the underlying contractor costs; and (3) by close review of PWT's invoices. This analysis follows.

Overall Oversight Costs. Union Pacific agreed to perform the work under the Consent Decree even though Ogden is not a Superfund Site and Union Pacific had conducted substantial prior Site investigation and remediation. Union Pacific retained CH2MHill as its contractor. As noted above, CH2MHill is an EPA contractor, is familiar with EPA requirements and protocols, and is recognized to be highly skilled and thorough as an environmental remediation contractor. Yet, EPA, its contractor, and the State all provided oversight. All three billed Union Pacific for their overlapping oversight. Indeed, PWT billed oversight costs for essentially full time presence at Ogden for nearly a year, even when field activities were not taking place. In totality, the oversight – and the attendant oversight costs – were unreasonably expensive and should not all be allowed.

Comparison of PWT Costs to CH2M Hill Costs. EPA's oversight costs are disproportionate to the costs Union Pacific incurred to actually do the work. The attached table of CH2MHill Work shows not only the schedule and type of work performed, but also the total contractor costs associated with the work performed during the same period addressed by the Response

³ *Id*

⁴ *Id* at 907. In *Bell*, the Fifth Circuit declined EPA's invitation to “prohibit judicial review of the EPA's expenditures [or to] . . . give the EPA a blank check in conducting response actions. . . . [S]uch unbridled discretion removes any restraint upon the conduct of the EPA in exercising its awesome powers; if the EPA knows there are no economic consequences to it, its decisions and conduct are likely to be less responsible.” *Id*

⁵ 42 U.S.C. § 9605(a)(7); *see also* 40 C.F.R. §§ 300.160 and 3003.180.

⁶ *United States v. Hardage*, 982 F.2d 1436, 1445 (10th Cir. 1992).

⁷ *United States v. USX Corp.*, 68 F.3d 811, 817 (3d Cir. 1995) (questioning the U.S.'s incurrence of response costs due to a “needless and expensive monitoring study”); *United States v. Dico, Inc.*, 266 F.3d 864, 879 (8th Cir. 2001); *Wash. State Dep't of Transp. v. Wash. Natural Gas Co.*, 59 F.3d 793, 805 (9th Cir. 1995).

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Cost Invoice. CH2MHill's charges totaled \$389,044. In contrast, EPA's oversight for the same period totaled \$244,549.69. Of those costs, PWT charged \$150,168.16. A month by month comparison of just CH2MHill's costs to those of PWT further illustrates the disproportionality, and therefore the unreasonable nature of EPA's costs. PWT's costs are as low as 10% of those of CH2M Hill and as high as 59% of CH2MHill's costs – even without including the indirect cost factor.

Month	CH2M Hill Costs (\$)	PWT Costs (\$) + indirect factor of 32.79%	Percentage: PWT Oversight to Work (w/o and with indirect costs)
October 2006	55,841	21,812 + 7,152 = 28,964	39% and 52%
November 2006	62,351	20,001 + 6,558 = 26,559	32% and 43%
December 2006	53,832	30,913 + 10,136 = 41,049	57% and 76%
January 2007	33,243	19,454 + 6,379 = 25,833	59% and 78%
February 2007	33,757	9,852 + 3,230 = 13,082	29% and 39%
March 2007	26,871	2,717 + 891 = 3,608	10% and 13%
April 2007	17,343	9,186 + 3,012 = 12,198	53% and 70%
May 2007	31,633	4,827 + 1,582 = 6,409	15% and 20%
June 2007	21,479	6,926 + 2,271 = 9,197	32% and 43%
July 2007	13,517	3,473 + 1,138 = 4,611	26% and 34%
August 2007	18,867	2,749 + 901 = 3,650	15% and 19%
September 2007	20,310	8,969 + 2,941 = 11,910	44% and 59%
TOTAL	389,044	140,879 + 46,191 = 187,070	

Detailed Review of PWT Status Reports. EPA provided copies of PWT's monthly status reports dated November 15, 2006 through October 12, 2007 to Union Pacific. Detailed review of those status reports reveals a number of budget problems. First, the monthly status report billed amounts do not track with the Response Cost Invoice details of PWT's charges. Even if the additional voucher number R7A59, dated September 14, 2006 in the Site amount of \$9,582.02 is included, the numbers still don't add up.

Turning to the status reports, specific problems are identified in the following discussion (see attached PWT Status Reports).

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November 15, 2006 Status Report. By the end of October, PWT was already notifying EPA that it would be at 83% of the expenditure limit budget by the end of November 2006. PWT apparently established its budget assuming concurrent oversight billing at another site, the International Smelting and Refining ("IS&R") Site through the majority of the Ogden contract.⁸ That did not occur, however, so PWT's recommendation was that its Ogden budget be increased – in essence just have Union Pacific bear the additional cost of covering PWT's entire contract even though it was supposed to be divided between two Sites. This recommendation – which it appears EPA followed – not only results in an unreasonable cost to Union Pacific, but is inconsistent with NCP in that a portion of PWT's contract cost for an entirely different site was essentially transferred to Ogden for Union Pacific to pay!

December 15, 2006 Status Report. Seventy-five percent of the expenditure limit was predicted to be reached during this reporting period.

January 16, 2007 Status Report. PWT apparently billed Union Pacific for PWT's contract negotiations with EPA to increase its contract amount for Ogden, since the IS&R Site work would be concluded early and/or because PWT was over budget for Ogden.

February 15, 2007 Status Report. No field work was conducted for the industrial sewer and the 21st Street Pond work was nearing completion. Yet, PWT billed \$19,453. JAM WORK →

March 15, 2007 Status Report. PWT did not have staff on Site in February as 21st Street Pond work was done and OU 4 Site work had not re-commenced. Yet, PWT billed \$9,852.21.

April 16, 2007 Status Report. Again PWT did not have staff on Site, but billed \$2,717.22 in March.

May 15, 2007 Status Report. In April PWT reviewed two reports and performed oversight for two (2) days, and billed \$9,185.59.

June 15, 2007 Status Report. In May PWT provided oversight for one day, suspended preparation of a draft report of the 21st Street Pond work, yet billed \$4,827.03.

July 16, 2007 Status Report. In June, PWT "coordinated" with EPA, did not work on any reports, and billed \$6,925.81.

⁸ See PWT November 15, 2006 status report, page 3 "Potential Problems and Solutions."

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August 13, 2007 Status Report. The same lack of activity is reported for July, as well: "coordinated with EPA," but PWT billed \$3,473.18.

September 6, 2007 Status Report. During August, PWT did provide oversight for 3 days and gave EPA "informal" comments on a field sampling plan addendum for a bill of \$2,748.56.

October 12, 2007 Status Report. No oversight activity significant enough to report in the Status Report was performed by PWT again in September, but it billed \$8,968.97.

III. Conclusion

Union Pacific has met the tests set forth by CERCLA and the NCP to demonstrate that at least \$70,000 of PWT's and the associated indirect costs of \$22,953 are inconsistent with the NCP. At a minimum, these PWT charges were unnecessarily expensive because they were duplicative of other oversight, they were excessive in cost, they do not reflect any oversight activities whatsoever in a number of months during the reporting period, and exceeded EPA's original Ogden Site budget for PWT. Consistent with the holdings in *In re Bell Petroleum Servs. Inc. (EPA v Sequa Corp.)*, 3 F.3d 889, 906-08 (5th Cir. 1993); *United States v Hardage*, 982 F.2d 1436, 1445 (10th Cir. 1992); and *United States v USX Corp.*, 68 F.3d 811, 817 (3d Cir. 1995), among other cases, the challenged PWT costs and associated indirect costs are unreasonable and should not be allowed. Even Ms. Pokorny of EPA characterized the charges as "questionable" in her message of February 14, 2008 extending the deadline for payment and challenge.

Since Union Pacific paid all charges, *albeit* conditionally, there is no necessity for Union Pacific to establish an escrow account. We request that Union Pacific be credited for future oversight costs by the amount of the challenged costs with which the United States ultimately agrees. We further request that the informal dispute resolution commence effective April 1, 2008 and continue through April 21, 2008. Union Pacific would be pleased to respond to any questions you may have and we look forward to prompt resolution of this matter.

Thank you in advance for your consideration.

Sincerely,



Carolyn L. McIntosh

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Enclosures

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Gary L. Honeyman (by electronic transmittal)

<u>Billing Period</u>	<u>CH2M HILL</u> <u>invoice</u>	<u>Work Conducted</u>
October, 2006	\$31,790 Pintsch	2006 2nd semi-annual groundwater monitoring event completed. Initial pond construction oversight - pond dewatering - dam location surveying. Containment of DNAPL seeps. 2-week construction delay from Envirocon needing dewatering permit.
	\$24,051 SP	Continuation of drainline cleaning, jetting and inspection from last month. Documentation of collapsed pipe sections. Flushing of main trunk lines downstream of JP3. Submitted Quality Managment Plan to EPA on October 10. Submittal of analytical results for cleaning fluids in 4 baker tanks (needed EPA approval on disposal to Central Weber.) Installed river gauging staffs.
November, 2006	\$45,269 Pintsch	Excavation of key trench & identification of thick gravel lense. Cofferdam alignment re-designed. Re-design documents sent to EPA 10/19 for approval. Cofferdam base installed. Lower portion of riprap installed. Excess sediments sampled for disposal evaluation. Results sent to EPA for approval of "thin spreading" in adjacent rail yard. For 2006 annual GW report, data validated and work conducted on preparing draft version.
	\$17,082 SP	Completed initially-scoped drainline cleaning on 11/3. 11/9 meeting in Ogden with EPA and DEQ on review of site data and path forward. 12 additional samples collected. Results received and forwarded to EPA 11/23. OU-04 semi-annual sampling conducted week of 11/27.
December, 2006	\$34,002 Pintsch	Cofferdam DNAPL drainline collection system installed. Manhole installations. Additional sampling and transport of excess material. Obtained EPA approval for placing material in AOI 34 concrete basin that fails screening level analytical. Placement of coarse aggregate behind cofferdam. Work conducted on draft OU-01 annual report.
	\$19,830 SP	Draft work plan and SMP being developed for OU-04 soil delineation. Completed OU-04 GW sampling and gauging.
January, 2007	\$27,467 Pintsch	Completed placement of coarse aggregate, hydrocarbon absorbent layer, and permeable material. Transported final loads of excess sediments to concrete basin. Installed CMP inlet extension. Placed fill and rodent barrier. Performed manhole leak testing. Started draft construction completion report.
	\$5,776 SP	OU-04 sampling soil delineation sampling WP submitted to EPA for approval.

February, 2007	\$23,405	Pintsch	Completed final construction items (set signs, buoys, regrade, etc.) Began raising pond level. Inlet pipe failure on 2/15. Lowered pond level.
	\$10,352	SP	2/13 conference call with EPA on comments on draft OU-04 sampling plan. Revised plan approved by EPA 2/20. Draft annual GW report finalized.
March, 2007	\$20,251	Pintsch	March 6 construction completion review site meeting with City EPA, and DEQ. 2006 annual GW monitoring report submitted 3/7. Completed repair/replacement of inlet CMP.
	\$6,620	SP	OU-04 GW report submitted 3/7. 3/12 EPA approval of revised OU-04 soil sampling plan. Estimate of site contaminant volumes provided to EPA.
April, 2007	\$10,329	Pintsch	Sheet pile installation completed. Pond level restored. preparation for OU-01 spring sampling event.
	\$7,014	SP	OU-04 sampling conducted week of 4/11.
May, 2007	\$17,947	Pintsch	Attended final construction completion inspection with EPA on 5/2. Began dewatering sediment in concrete basin. Conducted OU-01 GW sampling week of May 7. Construction completion report submitted 5/31.
	\$13,686	SP	Reviewed OU-04 soil data with agencies on May 2 site meeting. Submitted WP addendum. Conducted additional sampling week of 5/14. OU-04 1st semi-annual GW sampling week of 5/14.
June, 2007	\$15,048	Pintsch	Water treatment system upgrades and continued dewatering of concrete basin. June 6 construction completion celebration at EPA in Denver. Revisions being made to 2006 annual report based on EPA comments.
	\$6,431	SP	Revisions made to 2006 annual report to address EPA comments. Initial excavation plan for OU-04 developed.

July, 2007	\$13,517	SP	GW data for OU-01 and OU-04 validated. Work conducted on OU-04 excavation WP, engineering cost estimate for removal. Addendum to 2006 GW report submitted 7/20.
August, 2007	\$18,867	SP	Initial OU-04 excavation WP sent to EPA 7/19. Comments received regarding need for confirmation sampling. Revised plan submitted to EPA for further delineation without need for confirmation sampling 8/20. Approval recieved and drilling began on 8/27. Site well abandonment conducted. Additional soil sampling and source area delineation conducted.
September, 2007	\$20,310	SP	Evaluated additional soil data as it was received from the lab. Meeting with UDOT and DEQ on 9/12 regarding covenanats. Meeting with Taylors and DEQ on 9/13. Construction specification for OU-04 prepared. Bidders site walk on 9/13. Revised Construction Completion report submitted 9/19.
	\$389,044	Total	